Supreme Court, U.S.
FILED
AUG 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1601

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,
Appellees.

On Appeal from the Supreme Court of Alabama

BRIEF *AMICUS CURIAE* OF SOUTHEASTERN LEGAL FOUNDATION, INC.

WILLIAM O. MILLER
G. STEPHEN PARKER*
ROBERT B. BAKER, JR.

SOUTHEASTERN LEGAL FOUNDATION, INC.
2900 Chamblee-Tucker Road
Building 4
Atlanta, Georgia 30341
(404) 458-8313

Attorneys for Amicus Curiae
Southeastern Legal Foundation, Inc.

August 1985

**Counsel of Record*

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 3

I. INTRODUCTION 3

II. THE IMPOSITION OF INCREASINGLY HIGH PUNITIVE DAMAGE AWARDS, AND THE APPROPRIATE RESPONSE OF THE JUDICIAL SYSTEM, PRESENT IMPORTANT QUESTIONS OF PUBLIC POLICY 4

III. THE CONSTITUTIONAL VIOLATIONS PRESENTED BY THIS CASE PROVIDE A BASIS FOR THE COURT TO REVIEW THE ALABAMA SUPREME COURT'S DECISION 6

A. The Alabama Supreme Court's Review Of The Punitive Damage Award Was Incomplete Because Verdicts In Similar Cases Were Ignored And The Court Relied Upon Unfounded Assumptions ... 8

1. The $3.5 million punitive damage award is disproportionate in comparison with other judgments 8

2. When examining the lower court's award of punitive damages, the Alabama Supreme Court relied heavily on evidence of fraud and conspiracy, even though fraud and conspiracy counts had been withdrawn 11

IV. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO CONSIDER THE DEGREE OF DUE PROCESS PROTECTION REQUIRED FOR IMPOSITION OF PUNITIVE DAMAGES 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases:

Alabama Power Co. v. Smith, 273 Ala. 509, 142 So.2d 228 (1962) 8

Aspinwall v. Gowens, 405 So.2d 134 (Ala. 1981) 8,9

Carlisle v. Miller, 275 Ala. 440, 155 So.2d 689 (1963) 8

Carter v. City of Birmingham, 444 So.2d 373 (Ala. 1983) 9

Chavers v. National Sec. Fire & Cas. Co., 405 So.2d 1 (Ala. 1981) 7

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 13

Curtis Publishing Company v. Butts, 388 U.S. 130 (1967) 13

Dempsey v. Auto Owners Insurance Co., 717 F.2d 556 (11th Cir. 1983) 10

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 13

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979) 13

International Union, et al. v. Russell,
356 U.S. 634 (1958).....13

Mathews v. Eldridge, 424 U.S. 319 (1976).....14,15

Smith v. Wade, 461 U.S. 30 (1983).....12

Walden v. United States Steel Corp.,
567 F.Supp. 1443 (N.D.Ala. 1983), *aff'd in part*,
759 F.2d 834 (11th Cir. 1984).....9

Statutes:

Ala. Code § 6-5-410 (1975).....9
42 U.S.C. § 1983.....12,13

Miscellaneous:

22 Am. Jur. 2d *Damages* § 264 (1965).....6

Blodgett, *M.D.s Get Well*, 71 A.B.A. Journal 25
(August 1985).....5

Ellis, *Fairness And Efficiency in the Law*
of Punitive Damages,
56 So. Cal. L. Rev. 1 (1982).....4

Heninger, *Bad Faith In Alabama: An Infant Tort*
In Intensive Care, 34 Ala. L. Rev. 563 (1983)....7

1 *Personal Injury Valuation Handbooks*,
Current Award Trends, No. 292 (1985).....8

Schwartz, *Deterrence And Punishment In The Common Law of Punitive Damages: A Comment*, 56 So. Cal. L. Rev. 133 (1982) 4

2 S. Speiser, *Recovery for Wrongful Death 2d* (1975) 8

Wheeler, *The Constitutional Case For Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983) 14

W. Prosser & W. Keeton, *The Law of Torts* § 3 (W. Keeton gen. ed. 5th ed. 1984) 4

No. 84-1601

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,
Appellees.

On Appeal from the Supreme Court of Alabama

BRIEF *AMICUS CURIAE* OF SOUTHEASTERN LEGAL FOUNDATION, INC. IN SUPPORT OF APPELLANT

INTEREST OF *AMICUS CURIAE*

The Southeastern Legal Foundation, Inc. (''Southeastern'') herewith submits its brief *amicus curiae* in this case. The parties have consented to the filing of this brief and copies of their consent letters have been filed with the Clerk of this Court.

Southeastern is a non-profit corporation organized in 1976 for the purpose of advancing public interest viewpoints in adver-

sarial proceedings involving significant issues. Dedicated to economic and social progress through the equitable administration of law, Southeastern represents the views of its supporters who believe the rights of all persons should be properly protected and balanced in the courts. Toward that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court over the past nine years, including *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); and *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida, 723 F.2d 846 (11th Cir. 1984), cert. denied,* ____ U.S. ____, 105 S.Ct. 220 (1984.).

As proponents of a free and competitive economic system in which unnecessary governmental regulation is minimized, Southeastern is vitally interested in issues and cases which affect economic conditions, particularly matters arising out of or having a direct impact upon the Southeastern region of the United States. The impact of increasingly large punitive damage awards is felt in all segments of the economy and our society. The costs of such damage awards, borne by the ultimate consumers and purchasers of the product, can have an adverse impact on the ability of businesses to compete and upon the prices charged by these businesses.

For these reasons, there is a strong public interest in ensuring that there is an impartial and thorough judicial review of awards of punitive damages. Because the instant case presents an instance of judicial review so inadequate as to violate due process, Southeastern urges this Court to overturn the judgment of the Alabama Supreme Court.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the

brief on behalf of Appellant, Aetna Life Insurance Company.

SUMMARY OF ARGUMENT

Important public policy questions are raised by this case, in which the Alabama Supreme Court upheld a jury's award of $3.5 million in punitive damages against Appellant. In addition to the public interest in controlling costs of insurance and health care, the citizens of a State are affected by actions of a State's highest court which may have an adverse economic impact within that State.

Under the circumstances of this case the actions of the Alabama Supreme Court in failing to provide meaningful judicial review constituted a deprivation of Appellant's right to due process of law. A major shortcoming in the Court's review process was failure to consider verdicts and settlements in comparable cases.

This case presents an example of why some degree of due process protection should be required for imposition of punitive damages. Although there are sufficient grounds for reversal on well-established legal principles, the case also presents this Court with an opportunity to consider the degree of due process protection which should attach to proceedings in which punitive damages may be imposed.

ARGUMENT

I. INTRODUCTION

In the Jurisdictional Statement filed on behalf of Appellant, and in its brief on the merits, Appellant has eloquently set forth the basis for this Court's jurisdiction and the reasons why this Court should review and overturn the Alabama Supreme Court's decision upholding an award of $3.5 million in punitive damages for wrongful refusal to pay $1,650.22 of a $3,028.25 insurance

claim. In its brief Amicus, Southeastern Legal Foundation will not attempt to restate the arguments advanced by the parties, but, rather, will focus on certain public policy and constitutional questions presented by this case.

Amicus submits that this Court has jurisdiction to consider, individually and collectively, Appellant's contentions, because the case presents serious questions of violation of due process and other constitutional rights. In its consideration of these issues, the Court also has the opportunity to consider several aspects of the impact of the trend toward increasingly large awards of punitive damages on the legal system and upon society in general.

II. THE IMPOSITION OF INCREASINGLY HIGH PUNITIVE DAMAGE AWARDS, AND THE APPROPRIATE RESPONSE OF THE JUDICIAL SYSTEM, PRESENT IMPORTANT QUESTIONS OF PUBLIC POLICY.

It is indisputable that the expanding tort liability of individuals and corporations has had a dramatic impact upon our society. W. Prosser & W. Keeton, *The Law of Torts* § 3 (W. Keeton gen. ed. 5th ed. 1984). In recent years, this general expansion of tort liability has been accompanied by a tendency of courts and juries to grant increasingly large punitive damage awards. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 So.Cal.L.Rev. 133 (1982). Although punitive damages constitute only one facet or aspect of this overall picture, the nature -- and unpredictability -- of punitive damages introduce a major element of uncertainty into many aspects of our business and social lives. Moreover, this risk and uncertainty are factors which may not be insurable. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So.Cal.L.Rev. 1, 71 (1982).

Without belaboring these fairly obvious propositions, Amicus submits that they demonstrate the need for thorough and impartial judicial review in cases involving substantial punitive damage awards.

It is also evident that, in the absence of judicial control over the discretion of juries in awarding punitive damages, drastic and perhaps inappropriate legislative reaction is inevitable. For example, it is reported that newly enacted Illinois legislation limiting medical malpractice claims provides, *inter alia*, for the abolition of punitive damages against physicians or hospitals. Blodgett, *M.D.s Get Well*, 71 A.B.A. Journal 25 (August 1985). The imposition of such limitations appears more likely to occur in the absence of effective judicial review of such damage awards.

The public has an obvious interest in controlling the cost of insurance and health care. The costs of insurance are ultimately passed on to the consumers and purchasers, and an excessive punitive damage award against an insurer thus affects many members of our society. Additionally, to the extent that the State's economic climate is affected by actions of the judicial branch of government, the citizens of the State affected by a judicial determination have a special interest in a case such as the one before this Court.

In urging this Court to consider the social and policy ramifications of the imposition of unrestrained punitive damage awards, Amicus does not ask this Court to infringe upon legislative prerogatives, nor to invade the province of the State courts in determining issues of State law. Although the Alabama Supreme Court's opinion purported to rely upon its own prior decisions setting forth the applicable standards, (App. 34a), the failure to provide meaningful review of the punitive damage award is evident. In reviewing the lower court's award of punitive damages the Alabama Supreme Court found evidence

of "fraud and conspiracy," even though fraud and conspiracy counts initially brought against Appellant were withdrawn. It is also apparent that the Alabama Supreme Court did not consider, or disregarded, other similar Alabama cases in upholding the verdict. Under the circumstances of this case, such refusal by the Alabama appellate court to provide complete review of the punitive damage award has violated Appellant's right to due process of law.

III. THE CONSTITUTIONAL VIOLATIONS PRESENTED BY THIS CASE PROVIDE A BASIS FOR THE COURT TO REVIEW THE ALABAMA SUPREME COURT'S DECISION.

Inadequate appellate review may amount to a constitutional violation of due process when relevant precedent is overlooked or unfounded assumptions are made regarding the trier of fact's deliberations. In addition to this due process violation argument, Appellant may develop the constitutional issues of excessive fines under the Eighth Amendment, impairment of contract in violation of Art. I, § 10, and the disqualification question. Any of these constitutional arguments provide adequate reason for this Court to review the Alabama appellate court's decision.

Under certain circumstances the award of punitive damages is appropriate and just. Judicial review of such awards, while deferential to the jury's decision, must proceed with the awareness that juries are often swayed by emotion. 22 Am.Jur. 2d, *Damages* §264, p. 395 (1965). It is the responsibility of an appellate court to exercise its review authority to determine first, if punitive damages should be awarded, and second, what amount is reasonable to adequately punish the tort-feasor and serve as a deterrent to others.

The Alabama Supreme Court's opinion mechanically

restated the oft repeated appellate standard applied in reviewing punitive damage awards. (App. 33a-34a). When reviewing a punitive damage award to determine if it is excessive, an Alabama appellate court is obligated to consider whether bias, passion, prejudice or any other improper motive has influenced the jury's verdict.

A comparison of similar cases and verdict awards is implicit within an appellate court's examination of the lower court's verdict when considering whether a punitive damage award is excessive. This factor, while not always articulated, is an integral part of the review process. An appellate court does not operate in a vacuum, but is guided by precedent.

An appellate court which reviews a punitive damage award without considering similar previous verdicts is performing an incomplete function. The size of the verdict itself can be a significant factor indicating whether a jury has been influenced by improper motives. If, for example, all prior decisions for wrongful death in a state have consistently been within a reasonable range of each other and then a verdict is rendered which is twice or triple the size of all past verdicts, this is a clear signal that something may be amiss.

An additional factor which should mandate close judicial scrutiny is that the tort of bad faith refusal to settle a first party insurance claim was judicially created in Alabama. *Chavers v. National Sec. Fire & Cas. Co.*, 405 So.2d 1, 6 (Ala. 1981) (*per curiam*) (on application for rehearing). *See* Heninger, *Bad Faith in Alabama: An Infant Tort in Intensive Care*, 34 Ala.L. Rev. 563 (1983). Without the aid or guidance of the State Legislature, the Alabama Supreme Court recognized the existence of this new tort. The legitimacy of the State appellate court's action in recognizing a new tort is not questioned, but the lack of guiding or constraining legislation should cause any appellate court to pause during its consideration of a case ap-

plying the new tort upholding any exceptionally large award.

A. The Alabama Supreme Court's Review Of The Punitive Damage Award Was Incomplete Because Verdicts In Similar Cases Were Ignored And The Court Relied Upon Unfounded Assumptions.

1. The $3.5 million punitive damage award is disproportionate in comparison with other judgments.

The amount of the *Lavoie* punitive damage award is not a gradual or logical step in the continuing evolution of rising punitive damage awards in Alabama; instead, the *Lavoie* award is a radical aberration. Admittedly, a jury is not required to weigh precedent, reason or logic before rendering a verdict which is greater than any previous verdict in a similar case, but a reviewing court cannot act so cavalierly. While ever considerate and respectful of a trier of fact's verdict, an appellate court has a duty to act as a moderating influence where bias, passion or prejudice has influenced the verdict. *Carlisle v. Miller*, 275 Ala. 440, 444, 155 So.2d 689, 692 (1963), *accord Aspinwall v. Gowens*, 405 So.2d 134, 136-137 (Ala. 1981). A verdict awarding punitive damages which is so far in excess of any similar case indicates that the trier of fact's verdict was based upon bias, passion, prejudice or some other improper motive and is excessive. 2 S. Speiser, *Recovery For Wrongful Death*, § 9.4 (1975), [citing *Alabama Power Co. v. Smith*, 273 Ala. 509, 142 So.2d 228 (1962)].

In comparison, the Alabama Supreme Court's decision upholding the award of $3.5 million in punitive damages exceeds the national average award for the wrongful death of an adult male by more than $2.5 million. *1 Personal Injury Valuation Handbooks*, Current Award Trends, No. 292, p. 10 (1985). This discrepancy between the amount of punitive damages

awarded in most wrongful death actions and a bad faith refusal to settle a first party insurance claim suggests that it is a more serious offense in Alabama for an insurance company not to pay one of its insured's claims, than it would be to cause the wrongful death of that insured.

In a recent case, a U.S. District Court in Alabama reduced a wrongful death judgment from $2,000,000.00 to $1,250,000.00. In so doing the court considered whether the award of $2,000,0000.00 was excessive under Alabama law. *Walden v. United States Steel Corp.*, 567 F.Supp. 1443 (N.D. Ala. 1983), *aff'd in part,* 759 F.2d 834 (11th Cir. 1984). Alabama law only permits punitive damages to be awarded in a wrongful death action pursuant to the Alabama Homicide Act, Ala. Code § 6-5-410 (1975), and no compensatory damages are permitted. *Carter v. City of Birmingham,* 444 So.2d 373 (Ala. 1983). The *Walden* court began its examination of the verdict by acknowledging that, "the only measure of damages for wrongful death in Alabama is: 'What does it take adequately to punish the tort-feasor considering the extent and quality of the wrong committed?' " *Walden,* 567 F.Supp. at 1452. In addition to considering whether the verdict of punitive damages has punished the tort-feasor, the court may also examine how much was claimed in the *ad damnum* of the complaint and other comparable recent decisions. *Id.* The *Walden* court stated, "[t]his Court has examined numerous recent death verdicts and settlements in Alabama. A verdict of $1,250,000.00 would be in the upper range." *Id.*

In *Aspinwall v. Gowens,* 405 So.2d 134 (Ala. 1981), the plaintiff was awarded $1 million in punitive damages in a fraud suit against the insurer for wrongful refusal to pay a medical insurance policy claim of $2,702.80. On appeal the Alabama Supreme Court affirmed the judgment of the trial court on the fraud count, but also found the punitive damage award to be

excessive. The court issued an order of remittitur reducing the verdict by $750,000.

Dempsey v. Auto Owners Insurance Co., 717 F.2d 556 (11th Cir. 1983), was, like the instant case, an action for wrongful refusal to pay an insurance claim in which the Court of Appeals, applying Alabama law, found an award of $3.1 million in punitive damages to be excessive. The Court remanded the case to the trial court to require remittitur in the amount of $1.5 million as a condition to the denial of a motion for new trial. *Id.* at 562.

The *Dempsey* court set forth the criteria for appellate review of a punitive damage award as follows, "[t]he court should reduce a verdict which is not merely overly generous, but so excessive that it demonstrates 'bias, passion, prejudice, corruption or other improper motives or causes.' " *Id.* The Eleventh Circuit concluded that, while an award of punitive damages was appropriate, the sum of $3.1 million was "generous . . . excessive . . . based in part on bias, passion or other improper causes." *Id.* Accordingly, the trial court should have taken appropriate corrective action. *Sub judice*, similar conclusions could be reached based upon an examination of the facts of the instant case.

$3.5 million is $2 million greater than any comparable verdict in an Alabama bad faith refusal-to-pay case. The *Lavoie* verdict is also more than $2.5 million greater than the average verdict awarded for the wrongful death of an adult male in 1984. Surely human life is more valuable than any wrongful refusal to make an insurance payment, no matter how egregious the circumstances. These facts indicate that the Alabama appellate court has ignored established local precedent and upheld an unsupportable verdict.

2. When examining the lower court's award of punitive damages, the Alabama Supreme Court relied heavily on evidence of fraud and conspiracy, even though fraud and conspiracy counts had been withdrawn.

In its opinion the Alabama Supreme Court declared that it upheld the award of $3.5 million in punitive damages because "[t]he plaintiffs were able to show that the dark shadows of fraud and conspiracy enveloped each and every aspect of Aetna's actions regarding the handling of the Lavoie claim from the instance of the first denial and continued throughout the trial itself." (App. 35a). Next, the court offers a summation of the evidence presented to the jury "from which a jury could not only impute an intent to injure, but could hardly ignore it . . . [and] an open court demonstration of fraud on the part of Aetna in an effort to avoid liability...." *Id.* If the Plaintiffs really had such strong evidence of fraud and conspiracy, as the appellate court asserts in its opinion, it appears inexplicable that the Plaintiffs should have withdrawn their fraud and conspiracy counts in the case. (Jurisdictional Statement, p. 28). These actions seriously undermine the reliance by the appellate court on proof of fraud and conspiracy, and lend support to Appellant's arguments that their rights were violated. Because there was no issue submitted to the jury regarding fraud and conspiracy, the State appellate court's complete reliance upon this factor raises a serious question as to whether its review was sufficient.

IV. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO CONSIDER THE DEGREE OF DUE PROCESS PROTECTION REQUIRED FOR IMPOSITION OF PUNITIVE DAMAGES.

Initially, it should be stated that for this Court to hold that Appellant's constitutional rights were violated in this case would not, by itself, create any new set of requirements for review

of punitive damage awards in the State and Federal courts. For reasons stated above, the facts of this case, taken by themselves, demonstrate a denial of Appellant's constitutional rights in a number of respects. Such a holding by the Court would simply be a recognition that there were constitutional violations present under the unusual circumstances of this case. Whether additional due process requirements were necessary because of imposition of punitive damages could await subsequent cases for resolution. Nevertheless, the case presents an opportunity for the Court to consider the question of whether imposition of punitive damages requires some degree of due process protection.

The debate over the propriety, wisdom and appropriateness of punitive damages has surfaced in this Court on several occasions. A recent example was the Court's consideration of whether punitive damages could be imposed under 42 U.S.C. § 1983 for conduct by a defendant which constituted "reckless or callous disregard of or indifference to, the rights or safety of others," without a finding of bad faith or improper motive. *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). In a dissent from the majority's view that such damages could be imposed, Justice Rehnquist, joined by Chief Justice Burger and Justice Powell, considered the function of punitive damages, and observed that the ill-defined standards for imposition of punitive damages tended to defeat some of the underlying purposes for punitive damages. *Id.* at 45, 103 S.Ct. at 1642. The case *sub judice*, in which the conduct constituting the basis for a punitive damage award occurred prior to the Alabama Supreme Court's determination that such recovery was possible, is a clear example of the failure of the deterrence rationale.

This Court has considered the arbitrary nature of punitive damages in a variety of other situations. In holding that municipalities were immune from imposition of punitive damages under 42 U.S.C. § 1983, the Court recognized the

broad discretion "traditionally accorded to juries in assessing the amount of punitive damages." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S.Ct. 2748, 2761-62, 69 L.Ed.2d 616 (1981). In addition to numerous other reasons for concluding that municipalities were immune from punitive damages under 42 U.S.C. § 1983, the *City of Newport* case pointed to the perception of unlimited taxing power of a municipality which could encourage a jury to impose sizeable awards. *Id.* at 270, 101 S.Ct. at 2761. Amicus submits that the presence of a large and well-known corporate defendent, such as an insurance company, could have the same prejudicial impact on the jury.

This Court has also noted the fact that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974). The possibility that punitive damages could be employed to punish unpopular viewpoints or unpopular defendents has been recognized by this Court. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50, n.14, 99 S.Ct. 2121, 2127, n. 14, 60 L.Ed2d 698 (1979); *International Union et al. v. Russell*, 356 U.S. 634, 651, 78 S.Ct. 932, 942, 2 L.Ed.2d 1030 (1958) (Warren, C.J. dissenting).

To this point, most cases have rejected any requirement that due process safeguards be applied to the imposition of punitive damages. *E.g., Curtis Publishing Company v. Butts*, 388 U.S. 130, 160, 87 S.Ct. 1975, 1994-95, 18 L.Ed.2d 1094 (1967). A fundamental basis for rejecting such due process requirements, however, is that adequate appellate supervision of the amounts of punitive damages awarded serves as a balance against undue bias or prejudice which may be a factor in such awards. *Id.* at 160, 87 S.Ct. at 1994. *Sub judice*, the absence of adequate judicial scrutiny of an extraordinarily high punitive

damage award tends to refute the argument that due process protections are unnecessary.

One commentator has strongly suggested that the time has come for a reconsideration of traditional attitudes toward the role of punitive damages in our legal system. Wheeler, *The Constitutional Case For Reforming Punitive Damages Procedures*, 69 Va.L.Rev. 269 (1983). Wheeler maintains, *inter alia*, that the evolution of the requirements of the Due Process Clauses of the Fifth and Fourteenth Amendments furnishes support for the argument that some degree of due process protection should be accorded defendants against whom punitive damages are sought. *Id.* at 273.

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), this court set down several key factors in determining whether due process was being satisfied. These factors should be reviewed in light of the current case. In *Mathews*, the court stated that the "degree of potential deprivation is a factor to be considered in assessing the validity of any...decisionmaking process." *Id.* at 341, 96 S.Ct. at 906. Thus, in the punitive damages context, the amount of the award and the procedure for judicial review are fundamental to due process.

Applying the due process standards of *Mathews*, the Alabama Supreme Court's decision did not measure up. In the court's opinion no mention whatever is made that the judgment rendered might be too large. The court instead only gives reasons as to why the jury could hold the Appellant liable. (App. 33a-36a). The risk of error warned about in *Mathews* - "the risk of erroneous deprivation" - was not properly guarded against in the "decisionmaking" and appellate process. To protect the defendant against the "degree of...deprivation," the court should have examined and justified the *amount* of the award.

This court is thus presented with yet another opportunity to consider the role of punitive damages in our legal system, and to examine the record in this case, which strongly suggests a need for additional judicial control over the discretion of juries in awarding punitive damages.

CONCLUSION

For the foregoing reasons Southeastern respectfully urges this Court to reverse the judgment of the Alabama Supreme Court.

Respectfully submitted,

WILLIAM O. MILLER
G. STEPHEN PARKER *
ROBERT B. BAKER, JR.

SOUTHEASTERN LEGAL FOUNDATION, INC.
2900 Chamblee-Tucker Road
Building 4
Atlanta, Georgia 30341
(404) 458-8313

Attorneys for Amicus Curiae
Southeastern Legal Foundation, Inc.

* *Counsel of Record*